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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 SECURITIES AND EXCHANGE
4 COMMISSION

5 Plaintiff

6 v.

13 CV 2575 (GBD) (JCF)
Argument

7 GIBRALTAR GLOBAL SECURITIES,
INC., WARREN DAVIS

8 Defendants

9 -----x
10 New York, N.Y.
11 March 25, 2015
12 10:00 a.m.

13 Before:

14 HON. JAMES C. FRANCIS IV

15 Magistrate Judge

16 APPEARANCES

17 U. S. SECURITIES AND EXCHANGE COMMISSION
18 Attorneys for Plaintiffs
KEVIN P. O'ROURKE
TODD BRODY
CHRISTOPHER INNIS

19 DeFEIS, O'CONNELL & ROSE PC
20 Attorneys for Defendants Gibraltar & Davis
PHILIP CANNING PATTERSON

21
22 PECKAR & ABROMSON PC
23 Attorney for Defendant Carrillo
BRADLEY SUSSMAN

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1 (Case called)

2 THE DEPUTY CLERK: Counsel, state your name for the
3 record.

4 MR. O'ROURKE: Kevin O'Rourke on behalf of plaintiff
5 Securities and Exchange Commission.

6 THE COURT: Good morning.

7 MR. INNIS: Christopher Innis.

8 MR. BRODY: Todd Brody on behalf of the Securities and
9 Exchange Commission in the combined discovery case.

10 MR. PATTERSON: Philip Patterson, DeFeis, O'Connell &
11 Rose for Davis and Gibraltar. Good morning, your Honor.

12 MR. SUSSMAN: For Louis Carrillo, Bradley Sussman from
13 the law firm of Peckar & Abramson.

14 THE COURT: Good morning.

15 We have two things on the agenda in Gibraltar. We
16 have the pending motion with respect to the documents, and we
17 have the issue of the sites of the depositions. We don't
18 technically have anything on the agenda in Carrillo, but what I
19 would like to do at the end is take stock of where we are and
20 see what is pending and what the briefing situation is there.

21 I am happy to hear first from the movant in Gibraltar.

22 MR. SUSSMAN: Thank you, your Honor. Here or at the
23 lectern?

24 THE COURT: Your choice.

25 MR. SUSSMAN: OK. I'll stay here.

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I think it would be worthwhile just to take a moment and explain how we got to this point. It's in our filings, but I think it is relevant to the legal arguments, and, frankly, it may benefit our audience here.

Gibraltar, of course, is a Bahamian broker-dealer owned by Warren Davis. Back in 2010, the SEC's Washington D.C. office and the SEC's New York office were both conducting investigations. In 2010, in the course of those investigations, they requested documents from Gibraltar via its regulator in the Bahamas, which is the Securities Commission of the Bahamas, the SCB.

For the D.C. office, apparently they were primarily focused on a stock called Magnum d'Or, MDOR, an alleged pump-and-dump involving Magnum d'Or. For the New York office, I understand they're primarily interested in two stocks named Trade Show and Pacific Blue.

Fast forward to 2011. The SEC's Florida office commences an action in federal court in Miami, an enforcement action against the alleged perpetrators of the Magnum d'Or pump-and-dump. In fact, in that complaint, Gibraltar is in fact mentioned as the transactions allegedly at one point went through Gibraltar. Gibraltar was not named. Davis was not named in that action in Florida in 2011, and that action was concluded, I understand, by 2012.

Fast forward to the summer of 2012. Gibraltar

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1 appoints a liquidator under Bahamian law. Its board votes to
2 appoint a liquidator. I think the simplest analogy is it's
3 akin to a bankrupt trustee in the U.S. Of course, what you are
4 going to hear from the SEC is that part of that process is
5 Gibraltar's regulator, the SCB, has to accept the surrender of
6 Gibraltar's registration to complete the liquidation process.
7 But from the moment, the point being Gibraltar appoints a
8 liquidator, it closes down its business, and its 20 employees
9 are out of work.

10 Now fast forward to the spring of 2013, and the two
11 SEC offices determining to commence their actions against
12 Gibraltar and Davis in the D.C. case and against Gibraltar and
13 Davis and others in the Carrillo Heuttel New York case, but
14 they essentially waited until Gibraltar was closed down and
15 attempting to go into liquidation before bringing the action.

16 We went through motions to dismiss. We went through
17 initial disclosures. As part of the initial disclosure process
18 beginning about a year and a half ago, we raised the issues
19 that are before us today, at least with respect to the
20 documents, to the SEC. We told them that there is this issue
21 of control or lack thereof over the documents by Gibraltar. We
22 told them about the liquidator. We told them about the
23 confidentiality issue which I can go into in a moment, about
24 the confidentiality of Gibraltar's clients. We repeatedly
25 proposed resolutions to this in the form of exchange of

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Bahamian legal opinions. To date, I have not seen an opinion from the SEC by someone who is knowledgeable in Bahamian law on the subjects. We also during that year and a half long process suggested to the SEC some workarounds, first and foremost being a request for international channels. Gibraltar and Davis throughout this were advised by Bahamian counsel. I understand from Bahamian counsel that the SEC in the past has made international requests to the Bahamas. They work. It's a process of months rather than years. We suggested the SEC that if they pursued that, it might have resolved the issues that we're talking about. And the issue that we're talking about is Gibraltar is essentially stuck in a Catch 22. According to Bahamian counsel, you have the declaration from Raynard Rigby, who is a well-credentialed, well-respected member of the bar in the Bahamas, he says that when Gibraltar appointed a liquidator, when the board appointed a liquidator, the board ceased to function, and at that point they did, according to Bahamian counsel, everything that Gibraltar was supposed to do to get the SCB to accept the surrender of their registration.

THE COURT: Let's stop there for a second. Mr. Rigby, I take it, is Bahamian counsel to Gibraltar.

MR. SUSSMAN: He is.

THE COURT: So we don't have an outside expert's affidavit with respect to Bahamian law.

MR. SUSSMAN: Not an objective expert, if that's what

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1 your Honor is referring to.

2 THE COURT: I am.

3 The second question is, you said that they've done
4 everything they have to do. Is it not true that one per
5 requisite for their going to liquidation is the approval of the
6 SCB?

7 MR. SUSSMAN: This is why -- and, again, I'm operating
8 on the advice of Bahamian counsel -- it's a Catch 22. There is
9 actually another attorney, although he didn't provide a formal
10 affidavit. Mr. Sean Moree provided a letter, and he says the
11 same thing, which is, when the board voted to appoint the
12 liquidator, control over Gibraltar vests in the liquidator the
13 board ceases to function.

14 As a practical matter, another problem here is the
15 SEC, despite beginning these investigations in 2010 -- and I
16 forgot to mention that in 2010 -- maybe I did mention it -- the
17 SEC did get documents from Gibraltar via Gibraltar's regulator.
18 They made a request of the Securities Commission of the Bahamas
19 which passed it on to Gibraltar. Gibraltar to my knowledge
20 produced everything the SEC wanted. They could have asked for
21 these documents back then when Gibraltar was alive, frankly.

22 In 2011 they had an action in Florida against the
23 alleged MDOR pump-and-dumpers. Gibraltar is mentioned I think
24 in paragraph 20 of the complaint. They could have subpoenaed
25 documents at that point. They didn't. They waited. We're now

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1 in year five. They waited about three years until Gibraltar
2 was out of business. As a practical matter, that also
3 complicates the issue of control. As a legal matter, Bahamian
4 counsel advises that when the board appointed a liquidator,
5 that's it, the board no longer has authority. As I say, it's
6 really a Catch 22. The Securities Commission of the Bahamas
7 did not provide any reason why they are refusing to accept the
8 surrender of Gibraltar's registration. Gibraltar has an action
9 down there. They're trying to get clarity on this. They seem
10 to be the only entity that is trying to get clarity on it.

11 THE COURT: An action which apparently they are not
12 pushing forward, according to the recent submission.

13 MR. SUSSMAN: I was handed that about ten minutes ago.
14 The first thing I'd note is, like the declaration that the SEC
15 relies on, it's essentially hearsay. It's by someone who is
16 describing what counsel for the SCB is telling them, but all I
17 can say is that Bahamian counsel has told me that the reason
18 for the delay here is that's the way Bahamian courts move.

19 I asked him again yesterday when might this go to
20 trial. He said it might go to trial by the end of 2015.
21 According to him, that's the way the world moves down there.
22 That's all I can say.

23 I haven't had a chance to review this. I haven't had
24 a chance to run this by Bahamian counsel. I really can't speak
25 to it except to point out again that apparently it's hearsay.

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1 Anyway, the punch line of all this is we raised these
2 issues a year and a half ago. Gibraltar is simply not in a
3 position to produce these documents. I think when we had the
4 premotion conference on this motion, my colleague attended. I
5 think Mr. O'Rourke attended. I believe at that conference your
6 Honor may have asked has anybody tried to talk to the
7 liquidator on all of this.

8 So, once your Honor set the briefing schedule, I
9 picked up the phone and I called the liquidator. I'll be
10 completely honest, I didn't want to do it repeatedly, and I
11 didn't want to do it at length because I didn't want the SEC to
12 subsequently say that I was trying to steer the liquidator one
13 way or the other; but I can tell you this: It was a very brief
14 conversation. The word the liquidator used without prompting
15 was purgatory. He said Gibraltar is in purgatory, and he's not
16 comfortable doing anything until they get some clarity on the
17 legal situation.

18 The irony here is if the Securities Commission of the
19 Bahamas simply accepted the surrender of Gibraltar's
20 registration -- and I understand their refusal was
21 unprecedented, or virtually unprecedented -- there's no issue.
22 We have clarity, the liquidator is in control, and the SEC can
23 just go to the liquidator.

24 This is not a stalling tactic by Gibraltar and Davis.
25 It's a result of the fact that SEC waited until the company was

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1 dead before seeking these documents, and it's a result of the
2 fact that the Securities Commission of the Bahamas has done
3 something with no explanation that apparently is unprecedented.
4 And Gibraltar is trying to vindicate itself on these issues and
5 get clarity. If they succeed -- I guess because it's the
6 Bahamas, it's going to take time, but if they succeed, then
7 apparently the SEC can just seek the documents from the
8 liquidator.

9 It's not a stalling tactic. It's not strategery, as
10 the SEC has accused me of many times in the past. We propose
11 workarounds in good faith. We sent them Bahamian legal
12 opinions.

13 Actually, the SEC New York office is here, and I think
14 at this very moment, they're making a Hague Convention request
15 in the companion Carrillo Heuttel case for documents in the
16 Caribbean. I think in that instance it's Barbados. Bahamian
17 counsel informs me that the SCB does this all the time in the
18 Bahamas and that it would resolve some, if not all, of the
19 issues.

20 THE COURT: The difference in Carrillo is those are
21 third-party documents. Isn't that correct?

22 MR. SUSSMAN: Fair enough. As I say, Bahamian counsel
23 advised me that this mechanism works in the Bahamas.

24 Do you want me to get into the deposition issue or
25 should we stick with documents?

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1 THE COURT: Let's stick with documents.

2 MR. SUSSMAN: Nothing further.

3 THE COURT: Thank you.

4 MR. O'ROURKE: Thank you, your Honor.

5 Just a few points, a couple of things from their reply
6 brief, if I could. As you know, we did submit a full brief in
7 opposition. I think we've covered all the issues. I would
8 emphasize that a party relying on a foreign law to avoid
9 production of documents bears the burden of proving that such a
10 law exists and that it prohibits production of documents. We
11 haven't seen one regulation or one statute in the Bahamas that
12 prohibits production of documents here. They've totally failed
13 to meet their burden and they should be ordered to produce the
14 documents.

15 Secondly --

16 THE COURT: Let's stop there. When we say prohibits
17 them, if Mr. Patterson is reading is correct and Mr. Davis and
18 Gibraltar are without the authority to produce the documents --
19 they may not be prohibited, but isn't the effect the same?

20 MR. O'ROURKE: Don't have the authority? Well, your
21 Honor, if your Honor orders them there's nothing to preclude
22 them from producing the documents. They're a party here. The
23 court has jurisdiction over them. If they choose to not follow
24 the laws of this court, that's their choice.

25 THE COURT: But if they lack the possession, custody

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1 and control, how could they follow the orders of this court?

2 MR. O'ROURKE: But their basis for arguing they don't
3 have possession, custody or control is that the so-called
4 liquidator has the documents, but that liquidator is null and
5 void. The liquidation is null and void. As your Honor knows,
6 we pointed that out in detail, and that actually gets to my
7 second point in their reply brief. Not just once but twice
8 accused me of relying on the plain language of the statute.
9 Now, that is -- not just once but twice. In my 27 years of
10 practice at the SEC and a few years before that, no one ever
11 accused me of relying on the plain language of the statute.
12 I'm usually accused of not having a statutory basis or trying
13 to expand the statute, but here I'm accused of relying on the
14 plain language of the statute. What more do you need, your
15 Honor? The plain language of the statute says that they have
16 to get approval of the Securities Commission of the Bahamas
17 before they could go into liquidation, and they didn't do that,
18 your Honor.

19 Now, Mr. Patterson laid out some of the background of
20 this case, but he left out a very important element. First of
21 all, in Mr. Rigby's declaration, he points out in paragraph
22 seven, he says, "It must also be noted that on the 29th of
23 August 2012, GSSI passed a resolution dissolving the company by
24 appointing a liquidator."

25 Now, we know that they -- it never got approval from

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1 that liquidator, and the new declaration that we did submit
2 this morning from the executive director of the Bahamian
3 Securities Commission, Christina Rolle points out that they did
4 need to obtain authorization of SCB, and they didn't get that
5 authorization. And, in fact, the SCB wasn't told until months
6 later, if not significantly longer than that, that they even
7 purportedly went into liquidation. They didn't get the
8 authorization. They didn't even inform the SCB.

9 But let's go before that. August 29, 2012 when
10 Mr. Patterson laid out his summary. What he didn't point out
11 was the day before, August 28, there's an established procedure
12 well-known securities in law called a Wells notice that the SEC
13 staff gives to people, when the SEC staff is recommending an
14 enforcement action to the commission. They can submit a Wells
15 statement make their arguments.

16 The day before they went into supposed litigation,
17 they received a Wells notice from the SEC staff that an action
18 was going to be recommended. In fact, the Wells Commission was
19 then submitted on December 17, 2012 by DeFeis O'Connell & Rose.
20 And at the very start of that -- just so there is no ambiguity,
21 the very beginning says, "We make this submission on behalf
22 Warren Davis and Gibraltar Global Securities, Inc. in response
23 to the August 28, 2012 and November 20, 2012 Wells notices sent
24 by the staff of the division of enforcement. So, the very day
25 before they were told that an enforcement action is going to be

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1 recommended against both Mr. Davis and Gibraltar. And what did
2 they do the next day? They went in and passed a resolution
3 dissolving the company and appointing a liquidator, the
4 functional equivalent to a bank robber running down the street,
5 your Honor. They knew they were going to likely be sued, and
6 they go into liquidation or they claim they went into
7 liquidation but they didn't, because they didn't get authority
8 to do it and they didn't as a new declaration filed in the case
9 in the security -- that Gibraltar brought in the Bahamas
10 indicates the securities commission didn't even know that they
11 purported to be in liquidation. Mr. Patterson conveniently
12 left that piece of history out.

13 Another point, your Honor, in their reply brief not
14 having a basis that they can point to in the statute of
15 regulation claim that there's a commonlaw prohibition; not a
16 criminal prohibition, but a civil prohibition. We cited the
17 *Renert* case from Connecticut. They held no commonlaw
18 prohibition in the Bahamas. I even refer to the *Tournier* case.
19 I am probably not pronouncing it correctly. And said that
20 applies -- as we pointed out, that applies to banking
21 institutions.

22 Now, defendants haven't cited a single Bahamian case
23 that both *Tournier* applies to broker-dealers in the Bahamas.
24 Not a single. They even haven't cited a case that it applies
25 to broker-dealers in jolly old England, but they did under a

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1 Westlaw said they found dicta in two Australian cases that had
2 nothing do with broker-dealers. They only dealt with the
3 subject of a solicitor's confidentiality obligations.

4 For instance, one of the two authorities was a
5 solicitor who represented a husband and wife. It was a family
6 court case. It was held that the solicitor could not
7 thereafter represent the wife against the husband or vice
8 versa. That was the content. It had nothing to do with a
9 broker-dealer, and any of the reference to *Tournier* was
10 strictly dicta.

11 They knew that that wasn't enough. So what they did
12 do? They went and also found an Australian Law Review article.
13 Again, nothing from England or other parts of the commonwealth,
14 certainly nothing from the Bahamas. But they found a part of a
15 paragraph from an Australian Law Review article. The quote was
16 "The rationale in *Tournier*'s case for applying the contractual
17 duty of confidentiality in a commercial bank/customer
18 relationship is applicable to a wider group of financial
19 institutions."

20 Let's go on because that which they left out is
21 telling. "There is a strong argument that bank confidentiality
22 is not limited to commercial banks but also applicable to other
23 financial institutions seeking deposits from customers. It has
24 been held that there is an implied include duty of
25 confidentiality between credit unions and customers, and that,

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1 arguably, a similar duty is applicable to building societies
2 and merchant banks." That was the rest of the paragraph. So
3 you're still -- this law review article was talking about
4 extending *Tournier* to depository type institutions, not
5 broker-dealers, and they cited nothing to support application
6 of the *Tournier* case to broker-dealers, your Honor. So that
7 provides them with no support.

8 Now, they also told you, as your Honor referred to,
9 that the Bahamian case filed down there that they want you to
10 wait for is just waiting for a case management conference. In
11 fact, the indications are they have not been prosecuting at
12 all. It did come on -- the government down there I'm told
13 brought a motion for failure to prosecute that came on a few
14 weeks ago, but then the judge recused himself from knowing a
15 party. So that is still pending, I'm told, and a new judge
16 hasn't yet been appointed. Who knows how long that is going to
17 go on for.

18 This case certainly should not wait for that. Because
19 the ruling in the Bahamas case -- the application of law in the
20 Bahamas is that they don't have the authority of the securities
21 commission to liquidate. So that is the law in the Bahamas.
22 They're trying to obtain a different interpretation of the law,
23 but, your Honor, we are to follow -- you are to follow what the
24 law is as established and as reflected in the plain language of
25 the Statute Section 73 and Section 71 of the Securities

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1 Industry Act.

2 THE COURT: But if the court down there decided
3 contrary to what we think the plain language might be that in
4 fact the SCB was required to accept the liquidation, where
5 would that put us?

6 MR. O'ROURKE: Well, hypothetically, if that was
7 decided say, two years from now?

8 THE COURT: Yes, or tomorrow.

9 MR. O'ROURKE: We can't wait two years from now. We
10 have procedures here. That is the law down there now. Laws
11 can always change, but the application of the law or the plain
12 language of the law -- I don't think we need to look any
13 further since we have the plain language of the statute. But
14 it's -- if you want to look two years, three years down the
15 road, it can be a different statute. We don't wait for that.
16 The law is what it is. And assuming that the law down there
17 said you don't have to produce. Just assuming arguendo that
18 was the plain language. Your Honor could still order the
19 production and then the defendants have to make their choice.
20 Are they going to follow the law in a foreign country or are
21 they going to follow the law here? It's their choice to make.

22 THE COURT: Ordinarily I would go through the comity
23 analysis. It's your suggestion I don't have to go through that
24 analysis because there is no conflict.

25 MR. O'ROURKE: There is no conflict -- there is a

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1 conflict. It's between the defendants and their own country.
2 That's the conflict. Not between United States and United
3 States regulators and the Bahamian regulators, no conflict
4 whatsoever, your Honor. They've been cooperative. As you can
5 tell from the affidavit that was filed, they're not happy with
6 the conduct of the defendants in this case as well. So you
7 don't even get to the comity.

8 If you do, as we indicated in our brief, we've gone
9 through the elements and we've established those, I think. But
10 ultimately they have to make their choice or if your Honor
11 orders production are they going to follow your Honor's order
12 or not? And if they don't, there's consequences. And even if
13 the foreign law prohibited them, you still would go through the
14 comity analysis, and we believe that we would meet that, but it
15 would still be up to them to make their choice. If they don't
16 want to comply with the laws here, that's their choice, but
17 then there are very definite consequences if they don't produce
18 the documents if your Honor orders them to produce, and they
19 have no basis for refusing to produce those documents.

20 They say they are in limbo. They're in a Catch-22.
21 They're not in limbo. They're not in a Catch 22. They can't
22 even get to first base with their argument. They're not in
23 limbo. They're a registered broker-dealer in the Bahamas.
24 That's not limbo, your Honor.

25 Then they said we've received documents requesting

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1 some from the Securities Commission of the Bahamas. We pointed
2 that out. It's in our brief. We did obtain certain limited
3 documents, but they make clear that there's a lot more that
4 they're not producing, and they identify those in their initial
5 disclosures, their original initial disclosures and the amended
6 initial disclosures.

7 Obviously, if your Honor has any other questions, but
8 we do respectfully submit that we have shown that they should
9 be ordered to produce the documents. They haven't met the
10 burden, and we request your Honor order them to produce all the
11 documents related to U.S. customers by no later than April 24.

12 Judge Daniels said that it needed to be within 30 days
13 from this conference. I would think they could do it. We've
14 identified them all. They've isolated them at the warehouse.
15 They could do it within 15 days, but Judge Daniels said they
16 have to do it within 30 days or whatever your Honor orders.

17 So we would request that they be ordered to produce
18 all such documents. I would also ask for an order if there is
19 any loss or destruction of documents that they explain that at
20 the same time.

21 Your Honor, otherwise we rely on the brief.

22 THE COURT: Thank you, Mr. Patterson.

23 MR. SUSSMAN: Can I briefly respond, your Honor?

24 Mr. O'Rourke just said we can't wait two years for a resolution
25 down in the Bahamas. The fact is Gibraltar and Davis are in

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1 year five of dual SEC investigations. They previously produced
2 documents requested by the SEC in 2010. The SEC could have
3 asked for these documents then. We're three years removed from
4 the Magnum d'Or action. The Magnum d'Or action in Florida was
5 an alleged pump-and-dump, the exact same alleged perpetrators,
6 the exact same trading is what is at issue in their claim in
7 this case. They could have subpoenaed documents from Gibraltar
8 as part of that action. They could have named Gibraltar and
9 Davis as part of that action. So three years before filing
10 these actions to now complain about the delay, frankly, your
11 Honor the delay is not the fault of Gibraltar.

12 Mr. O'Rourke also made much of this affidavit he
13 handed me a half hour ago from this lady in the Bahamas. I
14 would point out, as your Honor pointed out with respect to
15 Mr. Rigby, she has a stake in this. She is objective. She is
16 with the defendants in the action down in the Bahamas.

17 Mr. O'Rourke also referred to *Renert*. *Renert* I think
18 is very, very distinguishable, first and foremost, because in
19 that case there was actually an opinion from the Bahamas
20 Supreme Court on the status of the receivership. That is not
21 the case here. That is what actually Gibraltar is fighting for
22 down in the Bahamas.

23 THE COURT: But in order to establish foreign law, you
24 don't need a decision in the same case with respect to the
25 application of law, do you?

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1 MR. SUSSMAN: No, your Honor, but the point
2 is that it is not analogous, in particular because of the
3 confidentiality argument that the defendant advancing. He was
4 arguing confidentiality under the Bahamian Constitution, a
5 Bahamian Mutual Fund Act, and the Bahamian Trust Act. We
6 haven't argued confidentiality under any of those laws down in
7 the Bahamas.

8 What we're arguing is more fundamental, which is
9 simply lack of possession, custody and control. We're also
10 arguing confidentiality. We were advised by Bahamian counsel
11 that if Davis or Gibraltar turn over their confidential client
12 documents, they subject themselves to liability in the Bahamas.

13 We raised this to the SEC a year and a half ago and
14 said an international request would most likely, we understand
15 from Bahamian counsel, solve this problem. Mr. O'Rourke makes
16 light of *Tournier*. Admittedly, it is an old case but it is a
17 good case. I actually just wanted to read you one sentence
18 from *Parry-Jones* case, which Mr. O'Rourke also did not find
19 persuasive. He dismissed it as involving a solicitor. In
20 fact, there were two privileges at issue in that case. There
21 was essentially an attorney-client privilege. I quote, and
22 this is from *Parry-Jones* case, ECF filing document 47. The
23 second privilege arises out of confidence subsisting between
24 solicitor and client similar to the confidence which applies
25 between doctor and patient, banker and customer, accountant and

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1 client and the like. The law implies a term into the contract
2 whereby a professional man is to keep his client's affairs
3 secret and not to disclose them to anyone without just cause.

4 See *Tournier v. National Provincial and Union Bank ."*

5 We are advised by Bahamian counsel that these are
6 relevant authorities. They are not as controlling as the
7 highest court in England, but they are relevant authority, and
8 we cite them because, frankly, if you Google *Tournier*, your
9 Honor, you'll find lots of articles written by large New York
10 law firms about how *Tournier* is still good law. These cases
11 show that it doesn't just specifically apply to bankers. It is
12 a professional duty of confidentiality that professionals owe
13 to their client. And that's a consideration and a serious
14 consideration for Davis and Gibraltar.

15 THE COURT: Aren't Davis and Gibraltar fully protected
16 if their disclosure is pursuant to court order?

17 MR. SUSSMAN: I believe this is actually in
18 Mr. Rigby's affidavit, but I know he has told me multiple times
19 they are only protected if it is an order from a Bahamian
20 court. With all due respect, I have the ultimate most respect
21 for your Honor in the Southern District, but apparently you
22 need a Bahamian court to get protection against violating
23 client confidentiality down in the Bahamas, and, again, the
24 international request process would have produced that result.
25 And had they pursued it a year and a half ago, I think we would

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1 be at that point right now.

2 Just quickly, on the last point, your Honor, is on the
3 comity issue if your Honor does indeed find a conflict of laws.
4 I was just re-reading the comity analysis last night, and it
5 struck me that the first factor mentioned is the importance of
6 the documents. It's one of the factors. I believe it is the
7 first mentioned.

8 Back in August of 2013, Mr. O'Rourke's predecessor at
9 the D.C. office wrote a letter to Judge Daniels opposing our
10 request to consolidate these two SEC actions. We quoted I
11 believe in our reply brief, he wrote that the SEC, the D.C.
12 office is prepared to move for summary judgment. This was back
13 in August of 2013. The only reason they're not moving for
14 summary judgment is because Warren Davis should be offered an
15 opportunity to testify on his own behalf. That was a year and
16 a half ago, they said they were ready to move for summary
17 judgment.

18 Even more recently, the SEC's D.C. office recently
19 served deposition notices on Davis and Gibraltar. The dates
20 they noticed, I believe, were February 25 and February 26 of
21 last month. So, clearly, they were prepared to depose Davis
22 and Gibraltar before they even had a resolution on this
23 document issue, much less have the documents. So, on that
24 first comity factor, the SEC seems to have made it abundantly
25 clear that these documents are not particularly important to

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1 proving their case.

2 I have nothing further, your Honor.

3 THE COURT: One last question before I hear from Mr.
4 O'Rourke. What about the coincidence of the filing for the
5 resolution bringing the company into liquidation the day after
6 the day after the receipt of the Wells letter?

7 MR. SUSSMAN: I can't speak to that, your Honor,
8 except I would assume that that Wells notice did not come out
9 of the blue, but particularly given that Gibraltar was
10 investigated and produced documents starting in 2010, I have to
11 believe that they had -- that they were well aware that this
12 potential was on the horizon.

13 THE COURT: I'm sure they were aware of the potential,
14 but it brings focus when you actually get a Wells notice.

15 MR. SUSSMAN: I believe we told the SEC during the
16 Wells process that Gibraltar was in the process of shutting
17 down. There was also an issue regarding their website, and
18 whether that was a solicitation and they had taken down their
19 website, we've made those points in the Wells submission. As
20 far as I know, it is purely coincidence. I have no
21 information, again, that this was a game of strategy to try
22 and get ahead of this issue.

23 THE COURT: Thank you.

24 MR. O'ROURKE: The Wells submission was a couple of
25 months later. They included it in their reference to close it

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1 down. It was August 28, and the Wells letter, I mentioned
2 earlier, that was December that came in.

3 A few points in response, your Honor. I'm not even
4 sure you need it, but the argument that we optimistically said
5 we expect to get summary judgment, we remain eternally
6 optimistic that we will get summary judgment. Nevertheless, in
7 spite of our eternal optimism, sometimes judges disagree with
8 us and we need to get discovery that we need and that we're
9 entitled to, first to buttress our summary judgment arguments,
10 and hopefully we won't get to this, in case we have to go to
11 trial, we need those documents regardless of our stated
12 optimism about summary judgment, and we're entitled to them,
13 and they haven't met their burden.

14 I also would note that in their motion to dismiss
15 before Judge Daniels, the two defendants or counsel made the
16 point over and over that the SEC can't point to a single
17 customer that used the website -- that was solicited by their
18 website, a key issue in the case. We can't point to a single
19 customer. Well, who has the records of their customers that
20 they won't produce? Who has the communication with all their
21 customers? The emails with those customers. There was a
22 customer writing in that said, "I saw -- I liked your website,"
23 whatever it might have been said, just as examples of points
24 that are relevant and then they point to us to not being able
25 to point to a single customer because they're hiding all that

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1 information. They're trying to have their cake and eat it too,
2 your Honor, and that's inappropriate. They should be producing
3 all the documents that concern their U.S. customers; not the
4 non-U.S. customers, but the U.S. customers. They've identified
5 all those documents. They're in the warehouse, they say. They
6 identify them in their initial disclosures, and that portion of
7 them that relates to the U.S. customers, we need access to. At
8 a minimum, if they ordered to produce them and they don't, at a
9 minimum, there should be a preclusion argument that that we
10 can't point to a single customer if they keep all the
11 information hidden.

12 He referenced the sworn affidavit that we only got
13 yesterday afternoon before I got on the train. I read it on
14 the train coming up last night. I would note that it is a
15 sworn affidavit. Rigby's affidavit or declaration, as it may
16 be, is not sworn. The affidavit we're submitting is sworn, and
17 the affidavit from the executive director of the Securities
18 Commission in the Bahamas says that they had to have
19 authorization of the SCB in order to go into liquidation; and
20 to put it mildly, it is inappropriate -- or it's wrong, I
21 should use a different word, for them not to have obtained such
22 authorization.

23 Finally, Renert, he referred to all the mutual fund
24 provisions at issue in Renert that aren't at issue here, he's
25 correct, but ultimately he left out the argument about

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1 commonlaw, confidentiality was at issue in *Renert* and was
2 rejected.

3 I have nothing further, unless your Honor has any
4 questions.

5 THE COURT: Thank you.

6 MR. O'ROURKE: Nothing further on that, as we still
7 have to decide this issue.

8 THE COURT: Why don't we start with that.

9 MR. BRODY: Your Honor, if I may, for purposes of the
10 motion that is at issue, our second discovery request in the
11 Carrillo Heuttel to Gibraltar and to Davis, the objections that
12 they made with respect to our request are the same issues that
13 are at issue in the Gibraltar case which we have been
14 discussing here. So to the extent your Honor rules on those,
15 we would request that the order comprise both with respect to
16 the documents sought in Gibraltar case and Carrillo Heuttel.

17 THE COURT: Well, in the absence of any application
18 other than what you've just made, I doubt that it will
19 encompass it.

20 MR. BRODY: I may be incorrect, but I thought that the
21 first papers that were submitted said to your Honor that it
22 also included -- that the issues were also the same.

23 THE COURT: I'm not sure it's going to make any
24 difference because it's going to bind everybody in any event.

25 MR. BRODY: Right, footnote three in our memorandum

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1 law firm raised that issue.

2 THE COURT: Mr. Patterson, do you want to talk to the
3 site of the deposition?

4 MR. PATTERSON: I do, your Honor. Gibraltar is, was,
5 a Bahamian corporation office in Nassau, Bahamas. It's never
6 had an office in the U.S. Davis is a Bahamian resident, a
7 Bahamian citizen. He's never lived in the U.S. He's never had
8 a business interest or office in the U.S. or anything like
9 that.

10 As we all know, the general rule is that parties are
11 supposed to be deposed where they are located. In this case,
12 Davis and Gibraltar are located in the Bahamas, which is a
13 two-hour plane flight away. It's the same time zone. The SEC
14 is supposed to put forth, I think the phrase is, peculiar
15 circumstances why Davis should be dragged up to New York for a
16 deposition.

17 First of all, I would like to be perfectly candid
18 here, your Honor. This investigation has been going on for
19 five years as to Gibraltar and Davis, and, frankly, your Honor,
20 resources to litigate and defend are becoming an issue. Also,
21 given the status of Gibraltar, which as we say is uncertain at
22 best, we advised the SEC last week that Gibraltar is simply not
23 in a position to put forth a 30(b)(6) witness regardless of
24 where the deposition takes place. On the advice of Bahamian
25 counsel, there's no mechanism for it, there are no employees,

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1 there's a lack of resources. Gibraltar would be able to unable
2 to build a 30(b)(6) witness, which is what they would have to
3 do. So, we told the SEC by letter last week that we are
4 withdrawing our proposed motion for protective order as to the
5 location of the deposition of Gibraltar, but we remain
6 completely convinced that the appropriate location for the
7 deposition of Davis individually is the Bahamas. Of course,
8 your Honor has seen the briefs. Really, I think what it boils
9 down to is the SEC is looking for the convenience of the SEC
10 itself. I took a poll informally of defense counsel for the
11 other parties. They have all advised they have no objection to
12 Davis being deposed in the Bahamas. We don't object. Of
13 course, that's our preference, and we believe that's
14 appropriate under the law. I know actually that the SEC New
15 York office sent out an email yesterday proposing dates to
16 depose defendants who are Canadian in Canada. I understand
17 they are also going to depose another defendant in California.
18 And I understand they're going to depose witnesses in Hong
19 Kong.

20 It seems to me if they are prepared to travel for
21 these depositions, and if there is no opposition from us, there
22 is no opposition from other defendants, the only party that
23 seems to want this deposition in New York is the SEC's D.C.
24 office, which under the general standards is not appropriate
25 ray. Davis is Bahamian resident and citizen. There is no

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1 reason to bring him up here. To be perfectly candid, and, in
2 fact, blunt, the other thing we did last week after much
3 consultation with our client, Mr. Davis, Mr. Davis directed us
4 to inform the SEC that when he is deposed, he will assert his
5 Fifth Amendment privilege in response to all questions having
6 to do with this action. So we said to the SEC, under the
7 circumstances, how about we give you a declaration or a
8 representation or a statement, whatever will satisfy you, to
9 that effect. That will be by far the most efficient,
10 convenient, economical resolution to this for everyone.

11 The response from the SEC New York office -- and,
12 frankly, I know that they have accepted similar arrangements
13 for other defendants in the Carrillo Heuttel case -- the
14 response from the SEC New York offices, they'll think about it
15 once the document issue is resolved. The response from D.C.
16 office was, no, Davis has to come here.

17 So really what they're arguing for right now is to
18 drag Davis up to New York away from his home, away from his
19 family, away from his attempts to earn some money now that his
20 business has been shut down, all so he can sit down for an hour
21 and a half and say "On the advice of counsel, I assert my Fifth
22 Amendment privilege." It is the least efficient, least
23 convenient, the least economic way of handling this. We
24 respectfully request the deposition of Davis should be ordered
25 to take place in the Bahamas where he lives.

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1 THE COURT: If resources an issue, isn't it more cost
2 effective for your client to come here than to pay for you to
3 go there?

4 MR. PATTERSON: One thing we proposed to the SEC is a
5 video deposition. I know in one of the opinions cited, I guess
6 it was *Mill Run*, the issue there was the defendant was
7 proposing a deposition by telephone. I think back then they
8 didn't have video conferencing. Today we have video
9 conferencing. Apparently, we have video conferencing
10 capabilities even in the Bahamas. If there is any dispute
11 during the course of the deposition and calls need to be made
12 to your Honor, to chambers, I speak with Mr. Davis frequently
13 by telephone. It is not an impediment. It is far more
14 economical.

15 Frankly, your Honor, I think with all due respect the
16 starting point is it's where the person's located. It's not
17 for the SEC to say, why shouldn't he come up here?
18 Particularly if he is going to assert his Fifth Amendment
19 privilege, it makes no sense to drag him here away from his
20 family, away from his home, and away from his attempts to earn
21 a living for the convenience of one of the SEC offices.

22 THE COURT: Suppose it were on the SEC's dime?

23 MR. PATTERSON: They've already proposed that, your
24 Honor. Frankly, I don't think it is fair and I don't think it
25 is right under the law. To be perfectly blunt, your Honor, I

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1 wonder whether the SEC has ulterior motives. I wonder whether
2 they are hoping that your Honor will order the deposition to
3 take place in New York, and then they are going to keep their
4 fingers crossed and hope that Warren Davis doesn't show up and
5 then they can move for default as a sanction for failing to
6 attend the deposition.

7 You have to bear in mind that Warren Davis --

8 Mr. O'Rourke referred to him as a bank robber, I believe a few
9 moments ago. In the New York action, some of the claims were
10 10b-5 against Gibraltar and Davis. We moved to dismiss. Judge
11 Daniels agreed with our arguments, and they amended. The only
12 fraud claim pending against the defendants now is a 17A
13 negligence standard claim, but the fact remains that they have
14 been investigated and charged by the SEC with securities law
15 violations.

16 I just can't help but wonder, and I know your Honor
17 mentioned this in the *Mill Run* opinion, I believe it was, that
18 it would be inappropriate to order someone into the U.S. for a
19 deposition as a means of apprehending him. I don't know if
20 that is what's going on here, but the fact that by far the most
21 convenient way of doing this would be by affidavit or even by
22 video from the Bahamas because he is just going to assert his
23 Fifth Amendment privilege. The cynic in me can't help but
24 wonder whether the SEC has an ulterior motive or they hope he
25 doesn't show and they can move for a default.

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1 MR. O'ROURKE: I can answer that, your Honor.

2 THE COURT: Are you done?

3 MR. PATTERSON: Yes, I am.

4 THE COURT: Go ahead.

5 MR. O'ROURKE: I thought he had been finished. I'm
6 sorry. But we have no intent to apprehend him.

7 We do have intent to take his deposition. It would be
8 videotaped. He and Gibraltar are the only defendants in our
9 case when we go to trial. I need his deposition. I need him
10 answering on the record. We're entitled. It's standard
11 procedure. The New York case, Carrillo has many defendants. I
12 can't speak to that case. I'm speaking to our need. And their
13 application for a protective order never said anything about
14 the Fifth Amendment, by the way. If they had, they told us
15 either Wednesday or Thursday in cryptic language he's going to
16 take the Fifth Amendment. They implied he wouldn't even be
17 coming. They implied it. I didn't say it. He is now
18 saying -- I guess he's saying that he will come. So it's a
19 two-hour flight. We have not just offered to pay it. We are
20 going to reimburse him. I can't promise first class tickets,
21 but we will reimburse him at the government rates and per diem
22 and hotel. It's two hours away.

23 He talks about Mr. Davis trying to earn a living.
24 Your Honor, they never submitted a declaration from Mr. Davis
25 that he's now in X business and he's doing this and he can't

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1 get away. That is the first time I even heard that he's trying
2 to earn a living. No proof of that, no proof at all, no
3 declaration that he can't get away. So we don't need to give
4 that any attention. And the advice of Bahamian counsel --
5 30(b)(6) is a rule applicable in this court. It's not the a
6 rule for Bahamian counsel to interpret, but they say they're
7 not going to show up. I don't think it is right to withdraw a
8 motion when the motion is ready to be presented to be argued.

9 So I think the appropriate thing is to get an order
10 requiring Gibraltar to attend the deposition in New York under
11 30(b)(6). It's not like there's no basis. Mr. Davis is the
12 president, the sole owner. He was, as indicated in the
13 recently filed affidavit, he was the one that attempted after
14 getting the Wells notice to put it into liquidation without
15 going through the appropriate route. He's the one who controls
16 it, so he could be a 30(b)(6) witness.

17 Indeed, he is not going to take the Fifth. That's why
18 we need him up here. He can't take the Fifth as to everything.
19 There were certain admissions in their answers to the
20 complaint. He is not going to be able to take the Fifth on
21 that. If he does, we need your Honor nearby for rulings on
22 that because the same analysis applies. At any rate, Gibraltar
23 should be ordered to attend. I don't think the motion can be
24 withdrawn at the last minute. To be sure, sanctions are
25 applicable if Gibraltar doesn't the attend under 37(d). I

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1 think an order at this stage since the protective order was
2 filed would still be appropriate as to Gibraltar.

3 With respect to the requirements concerning the
4 location of the deposition, I don't need to tell your Honor,
5 you wrote the seminal opinion in *Mill Run* in this whole area.
6 Every case cites your Honor's opinion in *Mill Run*. As pointed
7 out there, the normal presumption that they refer to doesn't
8 apply here, because we couldn't sue him in the Bahamas.
9 If we could, we would be required to go where he lives, but
10 we're the United States Securities Commission. We can only
11 file suit in the United States. So the Bahamas -- the normal
12 presumption simply doesn't apply here. This is where the case
13 is pending. It's a two-hour flight away. The convenience of
14 counsel still favors New York.

15 Assuming he took an accurate poll, although I think
16 there is more to that statement about the poll. We have still
17 have SEC New York counsel that wants to ask questions. We have
18 the Washington counsel who is train ride away. We have
19 Mr. Patterson and Mr. DeFeis. So the convenience of counsel
20 still favors it. All he's got to do is get on a plane, he will
21 be reimbursed, get up here and give us his deposition. Again,
22 no affidavit has been submitted or any kind of hardship on
23 Davis's business.

24 Your Honor has seen certain acrimony between counsel
25 in this case as a result of all the serial excuses that

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1 continues today when I focused on August 29 as a result of this
2 affidavit, and as a matter of fact the Wells notice was given
3 the day before. Their initial disclosures, the original one
4 and the amended never referred to August 29th. It was only the
5 Rigby declaration that finally referred to it, and it was that
6 declaration from the executive director in the Bahamas that
7 caused them to be concerned because they hadn't been provided
8 with any information.

9 Again, even if he is going to assert the Fifth, he can
10 do it, but we are entitled to contest that, to ask appropriate
11 pointed questions for use at trial, and we may very well need
12 the Court's availability. We didn't have time to submit a
13 brief because they didn't submit a brief using that as an
14 argument, but I did yesterday quickly look -- and I know there
15 was a case before Judge Duffy years ago. He ordered the
16 witness to show up for a question-by-question assertion of the
17 Fifth. They took him up to the Second Circuit and it was
18 quickly reversed, and they had to do it again. I found *U.S. v.*
19 *Malnik*, 489 F. 2d, 682, 685 (5th Cir. 1974). Witness is
20 required to appear and assert privilege on a
21 question-by-question basis. That is what's appropriate here.
22 That is what's required here. It may be more convenient for
23 him just to stay down in the Bahamas, but I think we're
24 entitled to it. We made a proper showing as to the appropriate
25 site of the deposition in our submission. And we will ask

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1 pointed questions about the admissions in both Mr. Davis's and
2 Gibraltar's answer to the complaint.

3 So, as a remedy, we would ask if your Honor agrees
4 with our opinion, for an order for defendants to attend their
5 depositions in New York at the time. It was either 9:00 or
6 9:30, whatever was in our previous notice, and at our New York
7 location, our New York office, on a set date. And we would
8 recommend, if your Honor orders documents, and when that is,
9 but if it is approaching 30 days, May 11 for Warren Davis and
10 May 12 for Rule 30(b)(6) witness, and if additional time is
11 required, to continue on the 13th. I note Judge Daniels has a
12 conference in the case on May 14. That is why the Monday,
13 Tuesday and if necessary Wednesday, why I am proposing those
14 dates and that that be included. And if not those dates, if
15 your Honor wants to put in any dates, we could all be there on
16 those dates. If he has a problem, I would ask him to propose
17 alternative dates before we leave so we don't have any further
18 disagreement. Thank you, your Honor.

19 MR. SUSSMAN: I can't propose any dates without
20 speaking to my client.

21 I just wanted out to point Mr. O'Rourke referred to
22 *Mill Run* and the convenience of the attorneys. I think it's
23 worth noting in your Honor's opinion in *Mill Run*, you note that
24 what is most important is the convenience of the parties. The
25 convenience of the attorneys comes after that. It is

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1 subordinate.

2 Mr. O'Rourke said they should be entitled to ask
3 pointed point-by-point questions of Warren Davis. Fine. They
4 can do that in the Bahamas where he lives and where he has his
5 citizenship.

6 To be perfectly blunt, your Honor it seems to me to be
7 manifestly unfair that Davis is defending two separate actions
8 in their fifth year by two separate offices. Discovery is
9 supposed to be coordinated or consolidated. The New York
10 office apparently is prepared to go to Canada to depose
11 defendants, which would implicate all the concerns over foreign
12 law that Mr. O'Rourke is mentioning in theory. That's what
13 those are. Those are hypothetical theoretical problems.

14 So if one office is prepared to go to Canada, they are
15 prepared to go to California, which is actually a longer flight
16 than the Bahamas, they're prepared to go to Hong Kong for
17 witness. It seems to be completely unfair that Gibraltar, I
18 think, frankly, for the convenience of the SEC attorneys -- or
19 Davis for the convenience of the SEC attorneys should be hauled
20 up to New York. I don't understand why they get different
21 treatment of individual party defendants in different cases.

22 It seems to me that if the SEC is doing Hague
23 Convention requests and is doing depositions in Canada on the
24 other case, there's no reason why they can't do them here. I'm
25 drifting back into the documents, but particularly when we

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1 first raised these issues a year and a half ago, as far as the
2 acrimony in this litigation, it is not coming from us. For a
3 year and a half we have been proposing solutions and
4 workarounds. It's our position that the default under the law
5 is he should be deposed where he is. I don't think, frankly,
6 the convenience of the lawyers or the SEC lawyer should be
7 determinative and should be what tips it in favor of dragging
8 Warren Davis away from his home, away from his country up to
9 New York. It's our position that it should be in the Bahamas.

10 Mr. O'Rourke mentioned he didn't brief this, although
11 I think we did brief it orally today, but if it would be
12 helpful for your Honor to seek further submissions, we'd be
13 happy to do that, although as I mentioned, the defendants are
14 really having to pick and choose their battles at this point
15 because their resources are being drained by this litigation.
16 I would respectfully request that it be done in letter form
17 rather than in the form of a formal motion.

18 Nothing further, your Honor.

19 MR. O'ROURKE: If I may, just briefly, your Honor,
20 Judge Daniels ordered that any briefing was to be done before
21 today's appearance. So if they are going to brief it on the
22 Fifth Amendment, that should have been submitted in a brief
23 before. Mr. Patterson was there when Judge Daniels ordered
24 that and had a chance to speak to it and he didn't. That was
25 the order. He's had his opportunity.

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1 He raised a point I would just like to respond about
2 this year and a half begging us to go and use alternative
3 maintenance. The fact of the matter is we begged them to show
4 us the basis for them withholding the documents. When they
5 referred to the Bank and Trust Act. We showed them that the
6 Bank and Trust Act didn't apply to broker-dealers. We showed
7 them when they mentioned the liquidation that SCB approval for
8 liquidation was required, and that they didn't have it. We
9 told them that. They're the ones that raised points and we had
10 to educate them each time. We showed them that registration
11 surrender was subject to SCB rejection when they raised that.
12 We showed them the plain language of the Securities & Exchange
13 Commission Act -- Securities Industries Act and we didn't need
14 more. They raised a point, and we answered and educated them,
15 but they still largely stuck by their points, your Honor.

16 And all along during the year and a half in
17 innumerable letters that we've asked them for the production of
18 all their document concerning their United States customers,
19 when are they coming? When are they coming? And they never
20 produced them. We said you need to file for a protective
21 other. And they never did. They never did. Finally, after
22 waiting, as your Honor knows, I filed a premotion on the issue
23 and your Honor ordered them to -- or set the schedule and then
24 they filed a motion for protective order. We weren't sitting
25 on anything for a year and a half. We were trying to get them

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1 to do their duty by pointing out the law to them, but they
2 continued to stand by it even though the plain language
3 indicated they had not basis.

4 Thank you, your Honor, for your time.

5 THE COURT: I'll reserve on those applications.

6 Let's turn briefly to Carrillo.

7 My understanding is we have three issues outstanding.
8 We have SEC's motion to compel that it is going to be fully
9 submitted the day after tomorrow. We have the Hague Convention
10 letters request application. And we have what I think
11 originally what started as the government's application with
12 respect to the location and the matter of taking the
13 depositions. And we have Mr. Kirk's application for protective
14 order that was made yesterday.

15 Am I correct about where we are on those things?

16 MR. BRODY: Yes, your Honor. I don't think that the
17 first two issues really need any discussion because we are
18 going to brief the issue or the issue with respect to the
19 briefing on the motion to compel, that will be completed by
20 Friday, although I will note that none of the officers or
21 directors of either Pacific Blue Trademark -- Pacific Blue
22 Trade Show or Skymark have opposed our motion. I guess there
23 are two oppositions, but none of them are by the people who we
24 think are privilege holders. But we will finish our briefing
25 on Friday. I don't know if anyone is going to propose the

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1 Hague Convention request. We request that those be granted.

2 I guess the bigger issue, an issue I am hoping we can
3 receive some clarity on today is the third issue. We have
4 depositions that are presently scheduled to take place tomorrow
5 and on Friday in Alberta and Vancouver respectively, and then
6 on Tuesday in Hong Kong. So, the SEC has set up the
7 depositions in a manner where the SEC and whichever lawyers
8 want to be present at the SEC offices in New York can do
9 deposition by video, and any defendant who wants to personally
10 attend those depositions can travel and attend those
11 depositions in the locus of Albert, Vancouver or Hong Kong.

12 THE COURT: I guess I am not inviting argument on that
13 because we don't have Mr. Kirk's counsel here.

14 MR. BRODY: The problem is though that Mr. Kirk's
15 counsel filed a motion for protective order yesterday, and the
16 deposition was supposed to start tomorrow.

17 THE COURT: Frankly, I am just assuming that your
18 initial letter is your response to their application. So I
19 don't know that there is anything else I need on this.

20 MR. BRODY: Well, Mr. Kirk's counsel does raise the
21 issue with respect to us paying for the cost of the deposition
22 under S.D.N.Y. Local Rule 30.1. We want to have the
23 opportunity to brief that issue, which is kind of separate from
24 the other issue. What I propose to your Honor is that there is
25 what I believe to be a Solomonic way of resolving this dispute

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1 where all of the parties' interests can be addressed. I would
2 just like to briefly state that to your Honor. In fact, I
3 raised this issue with Mr. Kirk's counsel, but he doesn't
4 address it in his motion for protective order.

5 THE COURT: I guess I don't want to hear it unless
6 Mr. Kirk's counsel is here. If you want to put it in writing
7 and copy him, that's fine. If you and he come to an agreement
8 with respect to this solution, that's fine as well. I just
9 don't want to be in a position where I'm taking a one-sided
10 argument.

11 MR. BRODY: I understand, your Honor. To some
12 respect, if you are going to file a motion for protective order
13 with respect to a deposition that is going to take place in two
14 days, and you know that there is a conference the next day, you
15 should be sending someone to that conference. That is my view
16 of it.

17 THE COURT: I understand. Put it in writing, copy
18 him, and we'll have it taken care of.

19 MR. BRODY: Thank you. I'm hoping that that
20 resolution which we will send to you in our letter would
21 hopefully resolve the issues.

22 THE COURT: That would be great.

23 MR. BRODY: Thank you. I send that to your Honor
24 within the next hour and a half, I hope.

25 THE COURT: Very good. Thank you all. (Adjourned)